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In The

Supreme Court of the United States

October Term, 1969

No. [redacted] 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,
Plaintiffs-Appellants

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,
Defendants-Appellees

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor Defendant-Appellee

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES, KURTZMAN AND SLOAN

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QUESTIONS PRESENTED

Where the State of Pennsylvania enacted a statute authorizing state purchases of secular education services from qualified nonpublic schools, irrespective of whether they are sectarian institutions:

(1) Was the three-judge District Court below correct in finding that the statute on its face and in the necessary effect of its administration does not violate the establishment clause or free exercise clause of the First Amendment?

(2) In view of the failure of the appellants to establish the proper standing, was the three-judge District Court below correct in refusing to consider conjectural allegations that the statute might be applied so as to violate the equal protection clause of the Fourteenth Amendment?

(3) Was the three-judge District Court below correct in granting Defendants' Motion to Dismiss in accordance with Rule 12(B)(6) of the Federal Rules of Civil Procedure because plaintiffs failed to state a claim upon which relief could be granted?

STATEMENT OF THE CASE

The Nonpublic Elementary and Secondary Education Act (Act No. 109 of 1968) was enacted to promote the welfare of the people of the Commonwealth of Pennsylvania and to promote the secular education of children attending nonpublic schools.[1] By its legislative findings, the act emphasizes the overwhelming and compelling necessity for state governmental support of the purely secular educational services provided by nonpublic schools.[2] Unquestionably, this act accomplishes its stated purpose to reduce the hazard to the education of Pennsylvania children which would be occasioned by the increased financial burden to the Commonwealth if a majority of parents of the present nonpublic school population were to remove their children to the public schools of the Commonwealth.

The act authorizes the Superintendent of Public Instruction to contract with qualified nonpublic schools for the purchase of "secular educational services."[3] The act does not provide for subsidies; rather, the Commonwealth makes payments from a

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[1] Act of June 19, 1968, P. L. , (Act No. 109), 24 Purdon's Pennsylvania Statutes Annotated 5601 et seq. (pocket part).

[2] 24 P.S. §5602(6).

[3] "A nonpublic school," is defined to mean a school other than a public school, wherein a resident of Pennsylvania may legally fulfill the requirements of the Pennsylvania Compulsory Attendance Law, 24 P.S. §5603(4).

special fund in fulfillment of its contractual obligation in exchange for services rendered to it by the contracting nonpublic schools.

The act prescribes and establishes strict limitations upon the types of secular educational services which it authorizes to be purchased:

> (1) The purchase of secular educational services is limited to the actual cost of teachers' salaries, textbooks and instructional materials in the four subjects of mathematics, modern foreign languages, physical science and physical education;
>
> (2) The act specifically prohibits the use of any public funds for the instruction of any subject matter expressing religious teaching or the morals or forms of worship of any sect.[4]

To insure the high standard and secular nature of these educational services, the act grants to the Superintendent of Public Instruction supervisory powers to maintain a satisfactory level of student performance and teacher certification in the four secular subjects.

On June 3, 1969, appellants filed their Complaint together with a Motion for Preliminary Injunction and a Motion for the convening of a three-judge court. They contend that the act violates the establishment clause of the First Amendment on the ground that receipt of public funds by sectarian institutions for any purpose is unconstitutional and that

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[4] Act of June 19, 1968, P. L. , 24 P.S. §5603(3).

the use of public funds for nonsectarian purposes unavoidably advances sectarian training.

The Complaint further alleges that the act on its face and as applied prohibits the free exercise of religion in that it constitutes compulsory taxation for the support of religion.

The appellants further allege that the act on its face and as it might be applied violates the Fourteenth Amendment in that it constitutes a denial of the equal protection of the laws by authorizing the use of public funds which might encourage discrimination. The appellees moved to dismiss the Complaint for failure to state a claim and for lack of standing.

On November 28, 1969, the court granted defendants' Motion to Dismiss the Complaint for failure of all plaintiffs to state a claim upon which relief can be granted. The Court found that the organizational plaintiffs lacked standing on all issues. As to the individual plaintiffs, the court found that only plaintiff Lemon had established standing to raise the First Amendment issue and that no individual plaintiff had standing to raise the Fourteenth Amendment issue.

The court did not reach its decision in a vacuum. On the contrary, all parties submitted extensive briefs on the issue of standing and on the merits of the case. Additionally, the court heard considerable and comprehensive oral argument on every issue. The District Court properly accepted as true all well-pleaded allegations of fact in the plaintiffs' complaint. Being a three-judge District Court convened pursuant to 28 U.S.C. 2284, the court considered only whether the act violated the First or Fourteenth Amendments as

a matter of law based upon facial constitutionality and not upon possible maladministration of the act. In so doing, the court found *Board of Education v. Allen*, 392 U.S. 236 (1968) to be decisive on the First Amendment issue. Applying the *Allen* test of purpose and primary effect, the court held that the purchase of secular educational services by nonpublic schools (which is the purpose and primary effect of this act) is a constitutional exercise of Pennsylvania's governmental duty to provide an efficient school system. It concluded that the act's purpose of promoting the welfare of the people of the Commonwealth of Pennsylvania and the secular education of children attending nonpublic schools had been constitutionally approved in *Allen* (App. A90, A91, A98). Further it found that the statute has been drafted with sufficient safeguards to insure that the authorized public funds would be expended only for secular purposes. It emphasized that the act on its face authorizes the payment of funds for services connected solely with the strictly secular subjects of mathematics, physical science, modern foreign languages and physical education. (App. A94, A95). The court particularly noted the express fiscal and quality controls in the act which support the defendants' contention that it maintains a position of complete religious neutrality.

The court specifically held that receipt of public funds by the nonpublic schools themselves rather than by the children or their parents is constitutionally irrelevant in view of the fact that the children, like those in *Allen*, are the ultimate beneficiaries of the statute (App. A97).

Having held that the Pennsylvania Nonpublic Elementary and Secondary Education Act did not violate the establishment clause of the First Amendment in any respect and that it did not support religion in any way, the court summarily dismissed plaintiffs' allegation that the act contravenes the free exercise clause of the First Amendment (App. A98, A99).

No plaintiff, including plaintiff Lemon, has alleged that he was personally affected by any intentional discrimination or de facto segregation or that he had attempted to enroll his child at any of these schools and was denied admission because of race or religion (App. A87). Consequently, there was no basis for the court below to consider the plaintiffs' contention that the act infringed upon their Fourteenth Amendment rights for the simple reason that no plaintiff satisfied the essential elements of standing to raise that issue. In finding the lack of standing the court placed great reliance upon, and quoted extensively from, this Court's opinion in *Flast v. Cohen*, 392 U.S. 83 (1968).

Judge Hastie, in his dissenting opinion, agreed with the majority that no plaintiff had established the requisite standing necessary to raise the Fourteenth Amendment issue. However, he would have denied the defendants' Motion to Dismiss as to plaintiff Lemon on the ground that the statute violates the establishment clause of the First Amendment. Judge Hastie was of the opinion that the primary purpose and effect of the act is religious. He held that the Pennsylvania Act, unlike the New York Act in *Allen*,

invites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions (App. A104).

SUMMARY OF ARGUMENT

The Pennsylvania Nonpublic Elementary and Secondary Education Act authorizes the Commonwealth of Pennsylvania to purchase secular educational services from qualified nonpublic schools, irrespective of whether they are sectarian. The court below found, as a matter of law, that the act provides adequate safeguards to prevent an establishment of religion. The court properly restricted its inquiry to the face of the statute in determining whether its purpose and primary effect is to involve the Commonwealth in the business of religion.

The Pennsylvania Act conforms in all respects with the neutrality doctrine as defined by *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Walz v. Tax Commissioner of City of New York*, 25 L. Ed. 2d 697 (1970). Further, the purpose and primary effect of the act is secular, neither advancing nor inhibiting religion. In fact, the statute specifically fulfills the requirement of *benevolent* neutrality as defined in *Walz* by equalizing the benefits of secular education for public and nonpublic schoolchildren.

The relationship created by the act between parochial schools and the Commonwealth is not one of interdependency; rather, it is one of purchase and sale of secular educational services.

This Court's opinion in *Allen*, supra, is decisive of the First Amendment issues raised in this case. The

New York statute therein upheld had the same purpose of equalizing state benefits among all its schoolchildren by irrevocably committing funds to provide secular educational services by nonpublic schools. The underlying premise in *Allen* applies equally to the instant case. That is, nonpublic schools, even if religiously oriented, perform a secular function which is, and must be kept, separate and apart from religious teaching.

The regulations by which Pennsylvania mandates that the educational services provided to nonpublic schools will be secular are substantially similar to those in *Allen*. In fact, by expressly prohibiting the use of any public funds for religious instruction or forms of worship of any sect, the Pennsylvania statute more effectively accomplishes that purpose.

The court below properly placed great reliance upon the legislative findings in the act which demonstrate the overwhelming and compelling necessity for state governmental support of the purely secular educational services provided by nonpublic schools.

Contrary to the arguments made by appellants, the government may employ religious agencies as the vehicle to accomplish a secular purpose provided that there are sufficient fiscal and quality controls so that no public funds are expended for the advancement of religion. The extensive controls in the Pennsylvania Act make it plain that, as a matter of law, there is no "blending" of the secular with the religious.

The fact that the nonpublic schools are the payees under the act is of no constitutional significance.

ARGUMENT

I. The Pennsylvania Act Which Authorizes State Purchases of Secular Educational Services From Qualified Schools, Irrespective of Whether They Are Sectarian Institutions, Does Not Violate the Establishment Clause of the First Amendment as a Matter of Law

It cannot be seriously disputed that the establishment clause of the First Amendment prohibits the states from setting up a church or supporting the religious activities of sectarian institutions. On the other hand, it has been conclusively determined that a state may not exclude persons, on account of their religion, from the benefits of public welfare legislation and must be neutral in its relations with groups of religious believers and nonbelievers. *Everson v. Board of Education,* 330 U.S. 1 (1947). In *Everson,* the Court upheld a New Jersey statute which authorized reimbursement to parents for the expense incurred in busing children attending both public and parochial schools. Mr. Justice Black, speaking for the Court in *Everson,* analogized busing to other necessary governmental services provided to parochial schools, such as fire and police protection, public highways and sidewalks. Thus, "state power is no more to be used so as to handicap religions than it is to favor them." *Everson,* supra at 18.

The Court has consistently upheld state legislation in which governmental responsibilities were general-

ly performed although religious schools derived some incidental benefits. In *Cochran v. Board of Education,* 281 U.S. 370 (1930),[5] a Louisiana statute which allowed state money to be used to purchase secular textbooks for all pupils in the state was upheld. Although the decision of the Court in *Cochran* was based on the Fourteenth rather than the First Amendment, the approach taken by the Court in that case is indicative of what was to be its philosophy on the establishment issue. Mr. Chief Justice Hughes speaking for the Court in *Cochran* said at page 375:

> "Its [the Louisiana statute's] interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded."

The doctrine of constitutional neutrality formulated in *Everson* was also applied and clarified in *Abington School District v. Schempp,* 374 U.S. 203 (1963).[6] Mr. Justice Clark characterized the *Everson* test as follows:

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[5] *Bradfield v. Roberts,* 175 U.S. 291 (1899) had earlier raised the question of the validity of an appropriation to a sectarian institution for secular purposes; however, the Court decided the case on the basis of the nonreligious nature of the corporation operating the institution.

[6] Counsel for appellants correctly points out that the purpose and primary effect test had its genesis in *McGowan v. Maryland,* 366 U.S. 420, 453 (1961): "We do not hold that Sunday legislation may not be a violation of the 'Establishment Clause' if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the state's coercive power to aid religion." (Brief for Appellants at p. 23).

> What are the *purpose and primary effect* of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be a secular legislative purpose and a primary effect* that neither advances nor inhibits religion. *Schempp*, supra at 222: See also *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968). (Emphasis supplied.)

In its most recent pronouncement concerning the establishment clause, the Court held that a New York law granting property tax exemption to religious organizations for land owned by them and used solely for religious purposes did not violate the establishment clause. *Walz v. Tax Commission of City of New York*, 25 L. Ed. 2d 697 (1970). In discussing the present state of the law, Mr. Chief Justice Burger made clear that the concept of neutrality in this area is not absolute and that therefore each statute must be carefully examined to determine whether the doctrine of neutrality has been violated. "The problem, like many problems in constitutional law, is one of degree." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). See *McGowan v. Maryland*, 366 U.S. 420 (1961). However, one general principle serves as the guideline for interpretation:

> "* * * we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benev-*

> *olent neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Walz*, supra at 702. (Emphasis supplied.)

It is highly significant that the *Walz* opinion supplements the previously-described neutrality doctrine in a dramatic way. As set forth above, the neutrality required of a state in the First Amendment area is now described as "*benevolent* neutrality." This same benevolence was present, but not specifically expressed, in *Everson*, supra and *Board of Education v. Allen*, 392 U.S. 236 (1968). The purpose and effect of the statutes in those cases was to equalize the benefits of public welfare legislation so that all students, whether in public or nonpublic schools, would be treated equally. The Pennsylvania act has accomplished precisely the same objective within properly regulated and defined limits. That is, each student in primary or secondary school (assuming that the school meets the quality standards established in the act) is now entitled to the same benefits of a quality secular education. Hence, this act is designed, and in fact accomplishes, the same result as the constitutionally-approved statutes in *Everson* and *Allen*.

As Mr. Chief Justice Burger recognized in *Walz*, the loan of textbooks in *Allen* logically must be considered an "aid" because it relieved the participating religious schools in New York of a substantial financial burden. Nevertheless, the Court applied the establishment clause in the same "sensible and realistic" fashion as Justice Black had done in *Everson*. It did not "construe the religion clause with a literal-

ness that would undermine the ultimate constitutional objective as illustrated by history." *Walz*, supra at 703. Rather, it looked to the primary effect of the act and concluded that such effect was manifestly secular.

It has been suggested that the extensive governmental safeguards present in the Pennsylvania act which insure that all public monies will be spent only for secular purposes make the act unconstitutional under the "excessive entanglement" doctrine of *Walz*. The Court enunciated that doctrine in the following language:

> "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. * * * [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz*, supra at 704, 705.

In the context of this case, as in *Allen*, it would be absurd to hold that the inclusion of specific safeguards in the act, as those are further limited by regulation, make the statute unconstitutional. On the contrary, those very safeguards make this act *constitutional* by guaranteeing that the secular is totally segregated from the religious.[7]

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[7] This same argument that such safeguards infect an otherwise constitutional act was recently approved by the United

The holding in *Walz* is in conformity with previous decisions of this Court. In *Zorach v. Clauson,* supra, the Court recognized that:

> "We are a religious people whose institutions presuppose a Supreme Being. . . . We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . *When the state encourages religious instruction . . . it follows the best of our traditions.* For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach,* supra at 313-314; *Walz,* supra at 703. (Emphasis supplied.)

The *Walz* opinion indicates that religion is an important element in our society. Therefore the Court's concern should not be whether religion has been incidentally aided. On the contrary, the test is whether there has been an establishment of religion to such

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States District Court for Rhode Island in *DiCenso v. Robinson* (decided June 15, 1970). That court declared unconstitutional a Rhode Island statute which had authorized payments of public funds to teachers of secular subjects in nonpublic schools. In doing so, it ignored the now well-accepted "purpose and primary effect" test of *Schempp* and *Allen* by assuming that this Court had abrogated that test in *Walz.* However, a plain reading of *Walz* yields precisely the opposite conclusion. As stated above, *Walz* approved the *Allen* decision despite the fact that the New York program was an "aid" to the sponsoring churches. Thus, the type of "excessive entanglement" discussed in *Walz* was not present in the statute in *Allen* although New York extensively regulated the relationship between church and state. The defendants submit that the Pennsylvania Act, like the New York Act in *Allen,* does not create that type of entanglement.

a degree that religion becomes the state's business. "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." *Zorach,* supra at 312.

Counsel for the appellants states in his Brief:

> "The defenders of the Act maintain that the result of the Act is to create a cooperate working arrangement between the Commonwealth of Pennsylvania and the parochial school system under which the parochial school system takes on a portion of the duty mandated in the Pennsylvania Constitution to maintain a public school system and, in turn, the State, *pro tanto,* supports the parochial system." (Brief for Appellants at p. 40).

It cannot be denied that this act creates a contractual relationship between the participating schools and the Commonwealth of Pennsylvania. However, this is not the type of day-to-day relationship which Mr. Justice Burger discussed in *Walz,* supra at 704 (Brief for Appellants at pgs. 42, 43). Such a relationship was not contemplated and certainly is not essential to the operation of the Pennsylvania Education Act. The relationship created is simply one of purchase and sale of secular educational services. On the one hand, the Commonwealth of Pennsylvania receives quality secular education; on the other, the contracting schools receive the necessary funds to provide that quality secular education.

The *effect* of the statute is the uppermost consideration. If that effect is to create an excessive government entanglement with religion, then the statute

must fall. However, as in this case, if its effect is to promote a secular purpose, then the statute conforms with the dictates of the First Amendment as enumerated in the decided cases and must be upheld.

Appellees submit that a state does not violate the doctrine of governmental neutrality when it uses public funds to equalize the general benefit to all of its citizens and to better insure receipt of quality secular education. Cf. *Rhoades v. Abington Twp. Sch. Dist.*, 226 A. 2d 53, 424 Pa. 202 (1967), appeal dismissed for want of a substantial federal question, 389 U.S. 11 (1967). In *Rhoades*, the Pennsylvania Supreme Court upheld the constitutionality of a statute which required school boards to provide free bus transportation to pupils attending nonpublic, nonprofit elementary and high schools if such provisions were also made for public school students. The Pennsylvania Court relied heavily upon *Everson* in holding that the act did not promote the establishment of religion or prevent the free exercise of religion. In doing so, it emphasized the purely secular nature of the statute which carefully differentiated between secular and religious aid.

The decision of this Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), is decisive of the First Amendment issues raised in this case. In *Allen*, the Court applied the neutrality doctrine and upheld the constitutionality of a New York statute which required the State to lend textbooks free of charge to all children in private sectarian and nonsectarian schools. The "purpose" there was to improve educational opportunities in the area of secular education:

> "The express purpose of §701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge." *Allen*, supra at 243.

The appellants repeatedly urged the court below to examine the legislative history of the statute in order to ascertain the "true intent" of the Legislature in the enactment of this statute. The District Court refused to make such an examination on the ground that the statute was clear on its face and that the intent of the Legislature, if that intent must be considered, is to be found in the legislative findings contained within the act (App. A92). The determination of the lower court on this point was proper in view of the long-standing principle that, absent some ambiguity, a court should only consider the express language of a statute. There is no necessity nor any justification for a detailed examination of the legislative history surrounding the Pennsylvania Education Act for the reason that the statute, in terms of its purpose and primary effect, is so clearly expressed. Accordingly, the District Court correctly followed the approach taken in *Allen* by limiting its inquiry to the legislative findings in the statute.

The Pennsylvania Legislature met the constitutional criteria of purpose and primary effect in its statement of purpose in Section 2 of Act No. 109. It found, and declared, that an education crisis exists in

the Nation and in the Commonwealth because of new emphasis on educational excellence and the increased cost thereof, that the state must find resources to further these advances, that the state can and must enter into contracts for needed educational services with persons or institutions, public or nonpublic, sectarian or nonsectarian, to fulfill its duties.

The validity of this legislative judgment was recognized by the Court in *Allen*:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the Court decisions, has been a recognition that private education has played a significant and valuable role in raising national levels of knowledge, competence, and experience. * * * [p]arochial schools are performing, in addition to their sectarian function, the task of secular education." *Allen*, supra at 247, 248.

The legislative findings contained within the Pennsylvania statutes are "not to be lightly set aside, and must be treated as conclusive of the existence of the facts recited in the absence of strong evidence to the contrary." *William Laubach & Sons v. City of Easton*, 32 A. 2d 881, 347 Pa. 542, 547 (1943) [citations omitted]. The court below recognized the importance of legislative findings and relied upon the following language of Mr. Justice Frankfurter:

> "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing. 'The decisions of this Court from the beginning lend no support whatever to

> the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' McCray v. United States, 195 U.S. 27, 56. 'Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts.' " [Citations omitted.] *McGowan v. Maryland,* 366 U.S. at 496 (App. A92, A93).

A court is not justified in attributing improper motives to a coordinate branch of State Government as the basis for invalidating a state statute.

The principle established in *Allen* is of critical importance here. A comparison of the Pennsylvania Public Education Act with the statute in *Allen* convincingly demonstrates that the purpose and effect of both acts are substantially similar. In *Allen,* this Court held that a New York statute authorizing loans of textbooks to students attending parochial schools was not violative of the establishment clause of the First Amendment. Although public funds are also irrevocably committed to parochial schools and other nonpublic schools pursuant to the Pennsylvania Education Act, expenditures under the act serve the same secular purpose as those in *Allen* by providing textbooks, teachers' salaries and instructional materials in the secular subjects of mathematics, physical sciences, modern foreign languages, and physical education. The significant fact in both cases is that public funds are being used solely for the purpose of providing *secular* education services to nonpublic schools.

The underlying premise in *Allen* was that nonpublic schools, even if religiously oriented, perform a secular purpose which is separate and apart from religious teaching. It follows that a state may constitutionally rely upon this distinct function in satisfying its duty of providing education. It has been long recognized that religious schools pursue two goals, religious instruction and secular education. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

A further premise in *Allen* was that a religiously-affiliated school can keep these two functions separate:

> "* * * we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Allen,* supra at 248.

The Court recognized that textbooks might differ from bus transportation in a constitutional sense if public funds were expended to provide *religious* books for New York school children. However, the Court found that only secular books could be loaned under the New York act, and consequently rejected the appellant's contention that the loan of textbooks inevitably advances the teaching of religion.[8]

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[8] The Court recently further clarified the concept of separation in the context of the establishment clause: "Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of

The fact that a purchase-reimbursement method is used rather than a loan method is a distinction without a difference, and is of no constitutional significance. As Chief Justice Hughes said in *Cochran v. Board of Education*, supra at page 375:

> "The Court [below] also stated, although the point is not of importance in relation to the federal question, that it was 'only the use of the books that is granted to the children, or, in other words, the books are lent to them."

Similarly, the purchase of the services of the teachers instructing the students in these secular courses provides no more than the medium through which the textbook knowledge is imparted to the student. These services perform the same secular function in the nonpublic or private school as they do in the public school.

The appellants argue that the District Court erroneously applied this Court's "purpose and primary effect" test by only considering facial constitutionality and the necessary effect of the statute's administration (App. A88, A89). In so doing, the court below classified as a conclusion of law the allegation that the purpose and primary effect of this act is to aid religion. In view of the striking similarity between the statute in *Allen* and the Pennsylvania act, the court justifiably found it unnecessary to permit discovery and testimony on the establishment issue. At best, the Appellants could have demonstrated only that the administration

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religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries. . . ." *Walz*, supra at 705.

of the act by the seven defendant schools (out of a possible twelve hundred contracting schools) violated the establishment clause. In the interest of judicial economy, such questions of application should be left to a single district judge rather than the three-judge panel convened here to decide the facial constitutionality of this act. Accordingly, the court below properly viewed the petitioners' allegation of unconstitutionality as a conclusion of law which need not be deemed admitted for the purpose of testing the sufficiency of the complaint on a motion to dismiss.

The foregoing discussion should convincingly demonstrate to this Court that the Pennsylvania act conforms with the neutrality doctrine set forth in *Everson*, *Allen* and *Walz*. It extends to nonpublic school children the same general state benefits enjoyed by other children and furthers the State's interest in secular education, without regard to religious belief. The fact that the *vehicle* through which the state provides these benefits might foster religion in other areas is irrelevant so long as that advancement of religion is not accomplished with public funds. In short, the crucial consideration is not *from whom* the educational services are purchased; rather, it is what type of services are purchases and who receives the benefits thereof.

Counsel for the appellants asserts that the wall of separation between church and state is so well defined that, as a general principle, a religious school cannot participate in the advancement of a secular purpose. In support thereof, counsel cites a quotation from the concurring opinion of Mr. Justice Brennan

in *Schempp*, supra to the effect that government may only employ religious means to serve secular interests if it can clearly be demonstrated that nonreligious means will not suffice. (Brief for Appellants at p. 39). That kind of broadside argument completely ignores prior decisions of this Court permitting religious schools to carry out the secular function of education. For example, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court unanimously held that parents of children in Oregon could constitutionally fulfill their statutory obligation of compulsory education by sending their children to parochial schools. There was no doubt in *Pierce* that the secular purpose of compulsory education was achieved through the vehicle of a religious school. Certainly we are not now rearguing the well-settled principles enunciated in *Pierce*.[9] The *Pierce* doctrine

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[9] *Pierce* is not the only case to permit the fulfillment of minimum educational requirements in parochial schools. The Court in *Allen* at n. 7 cited *Pierce* and its progeny with approval:

> "'* * * This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.' *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (citing *Pierce v. Society of Sisters*). A great many state cases have upheld a wide range of private school regulation. E.g., *Meyerkorth v. State*, 173 Neb. 889, 115 N.W. 2d 585 (1962), appeal dismissed for want of a substantial federal question, 372 U.S. 705 (1963); *State v. Hoyt*, 84 N.H. 38, 146 A. 170 (1929); *People v. Donner*, 199 Misc. 643, 99 N.Y.S. 2d 830 (Dom. Rel. Ct. 1950), aff'd men., 278 App. Div. 705, 103 N.Y.S.

adequately refutes counsel's broadly based generalization that religious means can never be used to accomplish secular ends.

The wall of separation between church and state as defined by this Court has not been breached by this Act. It is significant that the method used in the Nonpublic Elementary and Secondary Education Act to extend these benefits insures that only the *actual costs* of the authorized secular education service will be paid to the private schools. As in *Everson,* the actual cost of performance is payable only *after* the service is performed satisfactorily. Accordingly, this method is not a direct grant or subsidy to religious institutions which might be applied to some unauthorized use. This purchase of services method prevents the use of state funds for the expansion of facilities or for any other use that could premanently improve the institution. Further, payment for the textbooks and instructional materials used by the nonpublic schools can be made only if they are approved by the Superintendent of Public Instruction as appropriate for use in the four secular courses delineated in the Act. These safeguards provide even more assurance than did the New York Act in *Allen* that Pennsylvania will remain wholly neutral and will take no official action regarding the establishment of religion.

Unlike the New York Act, the Pennsylvania statute expressly prohibits the use of any public funds for the instruction of any subject matter expressing religious

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2d 757, aff'd mem., 302 N.Y. 857, 100 N.E. 2d 48, appeal dismissed for want of a substantial federal question, 342 U.S. 884 (1951)."

teachings or the morals or forms of worship of any sect. Pennsylvania Nonpublic Elementary and Secondary Education Act, §3(3) (App. A20). The New York Act permitted boards of education to designate textbooks to be loaned without expressly providing that public funds should not be used to supply books of a religious nature. *Allen*, supra at 239, 240.

The appellants repeatedly maintain that a state may not have any semblance of a working realtionship with a religious school. To do so, they contend, would *ipso facto* be a law "respecting the establishment of religion." Such an argument runs directly counter to the Court's decision in *Allen*. The New York Act extensively regulated the attendance and curriculum of New York private schools. New York Education Law, §§3201-3229 (1953). In fact, the underlying principle of the New York Education Law was that the instruction to be given in private schools satisfying the compulsory attendance law be "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." New York Education Law, §3204, subd. 2; *Allen*, supra at n. 7. The *Allen* opinion makes clear that each state may regulate the minimum hours of instruction, the qualifications of teachers and the quality of the subject matter of instruction in nonpublic schools. Thus, especially in view of *Pierce v. Society of Sisters*, supra, it can readily be seen that each state "has a proper interest in the manner in which [private schools] perform their secular educational function." *Allen*, supra at 247.

In view of the strict quality controls present in the New York Act, the Court recognized that a state may establish a working relationship with religious schools without necessarily violating the establishment clause. There is no constitutional reason why the state cannot only regulate, not only prescribe, but in fact *insure* the furtherance of its interest by purchasing quality education.

The fact that the nonpublic schools are the payees under the Act is similarly of no constitutional significance. This Court has never held that the funds must actually be paid to the student or his parents. As the court below correctly noted:

> "The child and society generally certainly benefit from the improvement of the secular education the child received regardless of whether there is a direct payment or loan to him or to his parents or to his school or teachers." *Lemon et al. v. Kurtzman et al.*, 310 F. Supp. 35, 47-48 (E.D. Pa. 1969) (App. A97).

Constitutional differences should not be resolved upon the basis of such technicalities. The *Allen* opinion implicity recognized this when it upheld the constitutionality of the New York statute despite the fact that parochial schools ordered and stored the textbooks before furnishing them to the students. *Allen*, supra at 244, n. 6.

The court below also held this not to be a case where "State tax-supported public school buildings, facilities and teachers are used as a forum for the dissemination of religious doctrines at times and on occasions when pupils are subject to the State's com-

pulsory attendance laws." *Lemon et al. v. Kurtzman et al.*, supra at 47 (App. A95, A96). (Citing *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Abington School District v. Schempp*, supra; *Engel v. Vitale*, 370 U.S. 421 (1962)). The common factor in *McCollum, Vitale* and *Schempp* was the state's intent, either expressly or by tacit consent, to involve itself in the business of *religion.*

In sharp contrast, secular education in America has been and is the state's business—an interest deemed by the Commonwealth to be critical to its existence. The Constitution of Pennsylvania gives witness:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Article III, Section 14.[10]

The Pennsylvania Legislature observed in Act No. 109 that almost one-fourth of the school age population in Pennsylvania attends nonpublic schools. The secular education of these citizens is no less critical to the Commonwealth's interest and purpose.

It is therefore apparent that the Pennsylvania Nonpublic Elementary and Secondary Education Act has

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[10] In footnote 5 of their Brief, appellants argue that one of the effects of the Pennsylvania Act is to convert the contracting nonpublic schools into public schools. They further contend that the *Schempp* case requires that all such schools eliminate religious ceremonies and observances. The fallacy of appellant's contention is plain. As in *Allen*, the participating schools are merely the *vehicles* through which secular education services are provided.

been meticulously drafted so as to comply with those decisions of this Court which have sustained similar statutes authorizing the use of public funds to support the secular functions of sectarian schools. The test of purpose and primary effect has been met. The purpose of the act is the secular education of children—a valid state interest, and its primary effect is neither to advance nor inhibit religion, but rather to strengthen the quality of secular education.

II. The Pennsylvania Act Which Authorizes State Purchases of Secular Educational Services From Qualified Schools, Irrespective of Whether They Are Sectarian Institutions, Does Not Violate the Free Exercise Clause of the First Amendment as a Matter of Law

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Having decided that the purpose and primary effect of the Act is secular and does not advance or support religion, the court below necessarily held that the plaintiff's challenge based upon the free exercise clause of the First Amendment was without substance. As a matter of law, the plaintiffs have failed to show "the coercive effect of the enactment as it operates against them in the practice of their religion." See *Abington School District v. Schempp,* supra, at 223 (1963).

As the court below specifically noted in its opinion, the appellants did not allege in what manner they were coerced in the practice of their religion. Their pleadings are silent as to what particular religious beliefs are affected by this act. Accordingly, as a

matter of law, the appellants' constitutional challenge based upon the free exercise clause must fail for the reason that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Schempp,* supra at 223.

In short, the plaintiffs have not demonstrated that this act in any way affects them in the exercise of any religious or devotional activity in any nonpublic school.

III. The Organizational Appellants Have No Standing To Maintain This Action Under the First or Fourteenth Amendments

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The appellants are (1) individuals who are citizens and taxpayers of the Commonwealth of Pennsylvania and (2) organizations situated in Pennsylvania. The organizational appellants allegedly are associations which "share as a common objective the separation of Church and State and the opposition to the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect exclude or otherwise discriminate against persons by reason of race or religion" (App. A9). The court below found that these organizational appellants lacked standing to maintain this suit under the religious clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment.

The authority of *Flast v. Cohen,* 392 U.S. 83 (1968), is relied upon by all parties to this litigation.

In *Flast,* Mr. Chief Justice Warren defined the specific elements necessary for standing. Under that formulation it is indispensable that the plaintiff allege that he has:

> ". . . a *personal stake* in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962); *Flast,* supra at 101; see *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 151 (1951) (concurring opinion of Frankfurter, J.). (Emphasis supplied.)

In addition, *Flast* requires each plaintiff to demonstrate some adverse legal interest which he is seeking to protect.

It is apparent on the face of the Complaint that these organizational appellants do not meet the requisite elements of standing made essential by *Flast.* Initially, there is no allegation that these organizations are taxpayers. Furthermore, the appellants do not allege that they have suffered any specific injury. Clearly, each of these organizations is as free of injury now as it was before the act was enacted. At best, their role in this lawsuit is one of *amicus curiae.* In fact, they are in the same category as the plaintiffs in *Doremus v. Board of Education,* 342 U.S. 429, 431 (1952), where the Court stated:

> "Apparently the sole purpose and the only function of plaintiffs is that they shall assume the

role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute."[11]

In their attempt to prove standing, these appellants rely upon the novel theory of the "Private Attorney General" advanced by Professor Louis L. Jaffe of Harvard Law School. See 'Standing to Secure Judicial Review: Private Actions" 75 Harv. L. Rev. 255 (1961). This theory is based principally upon the interest which an organization allegedly has in a particular public issue and not upon any specific injury which the organization might have suffered. While this theory may have some pedagogical appeal, it is directly contrary to the opinions of this Court on the subject of standing. To repeat, *Flast v. Cohen* requires nothing less than a personal stake in the outcome of the controversy. Moreover, *Flast* demands a showing of two further essential elements:

(1) The taxpayer must establish a logical link between the status asserted and the type of legislative enactment attacked; *and*

(2) The taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. *Flast*, supra at 101, 102.

On the basis of the pleadings in which the appellants fail to allege a logical nexus between the status

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[11] These organizational appellants are not indispensable parties for the maintenance of this action. Appellant Lemon has already demonstrated the requisite standing to challenge this statute on the basis of the religious clauses of the First Amendment.

asserted and the claim sought to be adjudicated, the court below properly concluded that these appellants have failed to establish standing as to both the religious and equal protection issues.

IV. Only Appellant Lemon Has Standing To Attack This Statute on First Amendment Grounds

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The three individual appellants allege that they are taxpayers of the Commonwealth of Pennsylvania and therefore possess the requisite stake in the outcome of this litigation required by *Flast v. Cohen.* Additionally, appellant Lemon alleges that he paid an admission fee to a Pennsylvania harness track, which fee included the tax source of the funds expended under this Act. The court below held that all three individual appellants had standing to maintain this action on First Amendment grounds.

As stated, the statute in question creates a Nonpublic Elementary and Secondary Education Fund which is financed solely from taxes and fees imposed upon horse racing in the Commonwealth of Pennsylvania. In order to demonstrate "the necessary stake as taxpayers" in the outcome of this litigation to satisfy Article III requirements, these individual appellants must, at the very least, allege that they have contributed to the special fund which is the sole source of funds under this act. Appellant Lemon is the only individual who has so contributed and therefore is the only appellant who is qualified to raise the First Amendment issue.

Relying upon *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Torcaso v. Watkins*, 367 U.S. 488 (1961), the court below held that the other two individual appellants, although they have not alleged the payment of any tax which would bring them within the class of affected taxpayers, also possess the requisite standing to raise the First Amendment issues. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she refused to work on Saturday, the Sabbath Day of her religion. Thereafter, the appellant sought unemployment compensation benefits under the South Carolina Unemployment Compensation Act, but was denied those benefits because she had "failed, without good cause, to accept 'suitable work. . . .'" *Sherbert*, supra at 401. The Court found that the denial of benefits infringed upon her constitutional rights under the free exercise clause of the First Amendment because of the inevitable pressure placed upon her to forego the practice of her religion. In *Torcaso*, an athiest who met all other requirements for the office of Notary Public in Maryland, refused to subscribe to the religious oath required of all such office-holders. The Court held that the Maryland Religious test could not be enforced against the plaintiff because it invaded his freedom of belief. *Torcaso*, supra at 496.

The holdings of *Sherbert* and *Torcaso* are inapposite here. The majority opinion of the court below assumed that the individual plaintiffs other than Lemon refrained from attending horse races so that they would not contribute to the teaching of religion. However, as Chief Judge Hastie correctly noted in his dissenting opinion below:

> ". . . the complaint contains no factual allegation that these plaintiffs desire to go to the races and have been deterred by reason of the known application of the racing revenues to the purposes of Act No. 109, and none of the individual plaintiffs has alleged any particular religious belief or any effect of Act No. 109 on the practice of a particular religion." *Lemon,* supra at 54 (App. A110).

Further, there is no merit to the theoretical argument that *all* taxpayers are affected by this Act on the ground that the revenues generated by harness racing could have been applied for some general use. Such a broad contention is not sufficient to establish standing. Again, the case of *Flast v. Cohen* is dispositive. Mr. Chief Justice Warren spoke of an "affected class" in describing the application of the "nexus" tests in *Flast:*

> "[where a challenged tax affects] . . . a particular class of taxpayers . . . the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers *within the affected class." Flast,* supra at 104 n. 25. (Emphasis supplied.)

In his dissenting opinion below, Chief Justice Hastie noted the foregoing language of *Flast* and added:

> "In order to have 'the requisite personal stake in the outcome,' the plaintiffs should have an established monetary interest in the relief sought, rather than an interest that will be realized only if judicial action enjoining expenditures supported by a particular tax program to which plaintiffs

are not subject shall result in a decrease in general tax burdens." *Lemon*, supra at 54 (App. A110, A111) (dissenting opinion of Hastie, C. J.). (Citation omitted.)

In the light of the decisions of Your Honorable Court, the individual appellants other than Lemon do not have standing to raise a First Amendment challenge to this statute. A contrary holding would destroy the precise limitations placed on the standing of taxpayers in *Flast* and would permit *any* taxpayer to bring suit to challenge *any* public expenditure.

V. No Appellant Has Standing To Challenge This Statute on Fourteenth Amendment Grounds

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The court below unanimously held that no organizational or individual appellant had standing to challenge this act on Fourteenth Amendment grounds. These appellants generally alleged that the contracting schools under the act intentionally discriminate in the selection of students. It was further alleged that de facto racial segregation exists in the appellee schools, and under the statute would be perpetuated and supported by public funds.

On its face, the Complaint fails to meet the standing requirements enumerated in *Flast*. No appellant alleged the requisite "personal stake in the outcome of the controversy" sufficient to permit him to bring suit. The two-fold burden in *Flast* prevents any of

these petitioners from raising the equal protection argument. It is to be emphasized that *Flast* requires every taxpayer to establish a logical link between the status asserted and the type of legislative enactment attacked *and* a nexus between that status and the precise nature of the constitutional infringement alleged.

Petitioner Lemon has alleged that he is a Negro whose child attends a public school in Pennsylvania. However, as the court below noted:

> ". . . There is no allegation in the complaint which asserts that Lemon's child attempted to enroll at any [contracting school] and was denied admission because of race or religion. * * * Race is indeed a relevant consideration to equal protection issues. However, our research does not disclose any case in which a person was permitted to challenge discriminatory practices, policies or laws *where he himself was not the object of such practice.* See e.g. *Burton v. Wilmington Parking Authority,* 365 U.S. 716 (1961); *Simkins v. Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (4th Cir. 1963) cert. denied 376 U.S. 938 (1964); *Deal v. Cincinnati Board of Ed.,* 369 F. 2d 55 (6th Cir.) cert. denied 389 U.S. 847 (1966) . . ." *Lemon,* supra at 41, 42 n. 14 (App. A87, A88).

VI. The Statute Does Not Violate the Equal Protection Clause of the Fourteenth Amendment as a Matter of Law

The court below unanimously held that no plaintiff had standing to raise the equal portection issue. Even if this Court were to consider the Fourteenth Amendment issue, the pleadings compel the conclusion that this statute on its face does not violate the equal protection clause.

It is fundamental that every state statute carries with it a presumption of constitutionality. *United States v. National Dairy Produce Corp.*, 372 U.S. 29, 32 (1963); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 354 (1936) (Concurring opinion of Brandeis, J.); *Fleming v. Nestor*, 363 U.S. 603, 617 (1960); *United States v. Harriss*, 347 U.S. 612, 618 (1954). Moreover, it must be assumed that the Commonwealth grounded its law on some rational basis within the knowledge and experience of legislators, even though some discrimination could eventually flow from the maladministration thereof. *Metropolitan Casualty Insurance Co. of New York v. Brownell*, 394 U.S. 580 (1935). Thus, "state legislators are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it". *McGowen v. Maryland*, 366 U.S. 420, 425 (1960). It is further to be presumed that the public officials charged with administering a state statute are acting properly and

applying the law in a constitutional manner. *United States v. Chemical Foundation*, 272 U.S. 1 (1926).

A reading of this statute demonstrates that the Pennsylvania Legislature has acted within strict constitutional limitations. There is no basis for even an inference that, as a matter of law, the act excludes from admission or otherwise discriminates against persons by reason of race. By adding the Fourteenth Amendment issue to the First Amendment challenge, the appellants are asking the Court to speculate that the act might some day produce some form of discrimination. But the basic issue for adjudication is not whether the act might be administered in an unconstitutional manner because the possibility or probability of such maladministration cannot nullify a statute. Otherwise, no statute could ever withstand a constitutional challenge on equal protection grounds.

Such speculative consequences were not even considered by the three-judge District Court below. The proper disposition of such conjectural allegations with respect to a specific case is by remand to a single-judge District Court. The existence of an appellant who has standing to raise the equal protection issue would not justify the Court in basing an adjudication upon a finding that the act might be administered in an unconstitutional fashion.

CONCLUSION

Appellees respectfully submit that every issue raised by the appellants in this appeal was properly decided by the three-judge District Court below.

Accordingly, the judgment entered by the United States District Court for the Eastern District of Pennsylvania should be affirmed.

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